Supreme Court, U.S.
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No. 03-377

IN THE

Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,

Petitioner,

v.

BRADLEY NIGH,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA AS *AMICUS CURIAE*

Manuel H. Newburger
Counsel of Record

Barbara M. Barron
BARRON & NEWBURGER, P.C.
1212 Guadalupe, Suite 104
Austin, Texas 78701-1837
(512) 476-9103
Fax: (512) 476-9253

Counsel for Amicus Curiae
The Commercial Law League of America

Balmar Legal Publishing Services, Falls Church, VA (703) 289-9000

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STATEMENT OF INTEREST[1]

1. The Commercial Law League of America (CLLA) is a 109-year-old national organization of attorneys, commercial collection agencies, and other experts in credit and finance actively engaged in the fields of commercial law and bankruptcy and reorganization. The CLLA is the publisher of the award-winning *Commercial Law Journal* and *Commercial Law Bulletin*. It has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable, and efficient administration of commercial and bankruptcy cases for all parties-in-interest. The League has been firmly committed to policing its own industry and has regularly provided articles and presentations to its members on consumer and commercial law issues.

2. Through its representatives, the CLLA has testified before Congress on numerous occasions, and the League has provided expert testimony in the fields of collections and bankruptcy and reorganization. The League has appeared as an *amicus curiae* before this and other federal courts in a number of cases. The vast majority of the League's membership represent credit grantors in collection disputes, and this case could have a significant impact on the League's members and their clients.

SUMMARY OF ARGUMENT

Petitioner espouses the decision in *Strange v. Monogram Credit Card Bank of Georgia*, 129 F.3d 943 (7th Cir. 1997). The Commercial Law League of America asserts that the reasoning of that case is defective and inconsistent with the rules of legislative construction adopted by this Court.

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[1] In blanket letters of consent filed with the Clerk, the parties have consented to the filing of *amicus* briefs in this case. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for a party and that no one other than *amicus* made a monetary contribution to the preparation or submission of this brief.

Respondent's position gives effect to each portion of Section 1640(a)(2)(A), whereas Petitioner's argument renders Section 1640(a)(2)(A)(iii) meaningless.

ARGUMENT

INTRODUCTION

Prior to a 1995 amendment, 15 U.S.C. § 1640(a)(2)(A) provided that a creditor who violated the Truth in Lending Act (TILA) was liable in an amount equal to the sum of:

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 percentum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000.

Prior to the 1995 amendment, the Court of Appeals for the Fourth Circuit had interpreted that final clause establishing the $100 minimum and the $1,000 maximum as applying to claims under both (A)(i) and (A)(ii). *See Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983).

The 1995 amendment changed Section 1640(a)(2)(A) to provide that TILA violators are liable for:

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is

> secured by real property or a dwelling, not less than $200 or greater than $2,000. . . .

The Court of Appeals for the Seventh Circuit has (without substantive discussion) applied the *Mars* approach to the current version of the statute. *Strange v. Monogram Credit Card Bank*, 129 F.3d 943, 947 (7th Cir. 1997). In the case at Bar, the Court of Appeals for the Fourth Circuit held that the 1995 amendment restricted the $100/$1,000 limitation on statutory damages solely to claims under Section 1640(a)(2)(A)(ii). While it both politically and professionally dislikes the potential outcome that may occur in unusual or extreme cases, the CLLA believes that this was the correct statutory interpretation.

I - *MARS* IS NO LONGER RELEVANT

The starting point in discerning congressional intent is the existing statutory text, and not the version of TILA that predated it. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 142 L. Ed. 2d 881, 119 S. Ct. 755 (1999). Since *Mars* was decided under the old statute it is not an appropriate starting point. *Strange* is also not an appropriate starting point, because it relied upon cases that were decided prior to the 1995 amendment, and the Seventh Circuit engaged in no independent analysis of the effect of the amendment on the potential recovery to a prevailing plaintiff.

II - THE STATUTE IS CLEAR

When the statute's language is plain, "the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6, 147 L. Ed. 2d 1, 120 S. Ct. 1942 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917).

Petitioner presents a cogent argument based upon House Legislative Counsel's Manual on Drafting Style § 341(F)(2), at 52 (2d ed. 1995) and United States Senate Office of the Legislative Counsel, Legislative Drafting Manual § 129(d)(1), at 43 (1997). If Congress had formally adopted those manuals as a code construction act, such arguments would carry far more weight. Instead, these manuals appear to be non-statutory, after-the-fact guidance that is both outside of the statutory framework and not a part of the legislative history of Section 1640. The League suggests that reliance upon such outside references is little different than relying on a post-enactment statement of legislative intent, an approach that this Court has rejected. *See, e.g., Heintz v. Jenkins*, 514 U.S. 291, 297, 115 S.Ct. 1489, 1492, 131 L.Ed.2d 395, 401 (1995). While the House and Senate manuals may represent aspirational guidelines for legislative drafting, they cannot change what Congress has actually written into that which it could have written.

The only ambiguity in Section 1640(a)(2)(A) is that which Petitioner seeks to manufacture. As the statute is worded there are three types of statutory penalties: Section 1640(a)(2)(A)(iii) deals with mortgage loans and sets $200/$2,000 limits on recovery; Section 1640(a)(2)(A)(ii) deals with consumer leases and sets $100/$1,000 limits on recovery; and Section 1640(a)(2)(A)(i) deals with other consumer transactions and sets a statutory penalty without a floor or a ceiling (except the ceiling created by the limits on the loans that are subject to that section). Petitioner argues that "except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000" applies to the entirety of Section 1640(a)(2)(A). If that were true, it would apply to Section 1640(a)(2)(A)(iii), creating a logical absurdity in which Congress added the new $200/$2,000 limits for mortgage loans and then simultaneously set an additional $100/$1,000 limit as an overlay to the new provision of the Act.

The limiting phrase in Section 1640(a)(2)(A)(ii) cannot apply to the whole of Section 1640(a)(2)(A), as that would emasculate Section 1640(a)(2)(A)(iii). Thus, the ambiguity asserted by Petitioner and the *amici* who have weighed in on its behalf is illusory. The plain meaning of the statute supports the interpretation given it by Respondent and the Court below. Respondent's position gives effect to each portion of Section 1640(a)(2)(A), whereas Petitioner's argument renders Section 1640(a)(2)(A)(iii) meaningless.

III - THE END DOES NOT JUSTIFY THE MEANS

Petitioner and the *amici* who support it express concern over the cost both to consumers and the lending industry if the decision of the Court below is affirmed. While the CLLA shares those concerns, it believes that they, too, may be illusory.

The stated concerns are somewhat questionable for four reasons. First, lenders who suffer losses due to dealer errors will be able to recover those losses through indemnification claims against the dealers whose errors cause the losses. (Admittedly, the occasional dealer may not be sufficiently solvent to indemnify the lender, but lenders who exercise good judgment in selecting their business partners and in mandating reserves should not have problems.) Second, the law already protects lenders against mere "picky and inconsequential errors." *Brown v. Payday Check Advance*, 202 F.3d 987, 991 (7th Cir. 2000), cert. denied, 531 U.S. 820; 121 S. Ct. 61, 148 L.Ed.2d 27 (2000). Third, creditors have an opportunity to avoid liability if they correct errors within sixty days of discovering them. 15 U.S.C. § 1640(b). Fourth, creditors can invoke the *bona fide* error defense contained in 15 U.S.C. § 1640(c), which provides that a creditor or assignee may not be held liable in any action brought under TILA if it shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

However, even if the policy concerns raised by Petitioner and its *amici* have any legitimacy, those concerns would not justify disregarding the plain language of the statute. Given a choice between effecting an undesirable outcome or disregarding the express wording of an unambiguous statute, the Court should neither enlarge nor restrict the effect of the Congressional act. *See Iselin v. United States*, 270 U.S. 245, 251, 70 L. Ed. 566, 46 S. Ct. 248, 62 Ct. Cl. 755 (1926); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 56 L. Ed. 2d 581, 98 S. Ct. 2010 (1978). The rationale for this policy is that this Court traditionally grants deference to "the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *United States v. Locke*, 471 U.S. 84, 95, 85 L. Ed. 2d 64, 105 S. Ct. 1785 (1985), *citing Richards v. United States*, 369 U.S. 1, 9, 7 L. Ed. 2d 492, 82 S. Ct. 585 (1962).

This Court recently reiterated these principles of legislative construction in *Lamie v. United States Trustee*, __ U.S. ___, 124 S. Ct. 1023; 157 L. Ed. 2d 1024 (2004). The CLLA urges the Court to hold firm in its adherence to these rules, favoring strict statutory construction over the questionable approach espoused by Petitioner and the *amicus curiae* appearing on its behalf.

CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

Manuel H. Newburger
Counsel of Record

Barbara M. Barron
BARRON & NEWBURGER, P.C.
1212 Guadalupe, Suite 104
Austin, Texas 78701-1837
(512) 476-9103
Fax: (512) 476-9253

Counsel for Amicus Curiae
The Commercial Law League of America